

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 39E 30150495 BY DENBURY GREEN PIPELINE – MONTANA LLC</b>	) ) )	<b>PRELIMINARY DETERMINATION TO GRANT TEMPORARY PERMIT</b>
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On December 8, 2020, Denbury Green Pipeline – Montana LLC (Applicant) submitted Application for Temporary Beneficial Water Use Permit No. 39E 30150495 to the Billings Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 6.14 AF volume for industrial use (dust abatement). No flow rate was requested because the point of diversion is an onstream reservoir. The Department published receipt of the Application on its website. The Applicant requested, as part of the application, a variance from ARM 36.2.1702 (4) requiring source measurements. The variance was granted on January 19, 2021. The Department met with the Applicant (Rusty Shaw and Bill Atchinson for Denbury) and consultant Chad Barnes (for SWCA), on November 13, 2020, for a pre-application meeting. Mark Elison, Jill Lippard and Christine Schweigert were present for the Department. The Application was determined to be correct and complete as of May 14, 2021. An Environmental Assessment for this Application was adopted on April 14, 2021.

**INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Maps: Two undated Aerial photographs showing the proposed point of diversion and the place of use.

- List of legal land descriptions for the place of use along pipeline right-of-way and access roads.
- Request for variance from measuring requirements included within the application.

#### Information Received after Application Filed

- Response to request for variance from measurement requirements dated January 19, 2021.
- Email from SWCA consultants to Christine Schweigert dated May 10, 2021 requesting an interim permit with receipt for the filing fee attached.
- Email chain between SWCA and Christine Schweigert dated May 11, 2021 discussing place of use legal land descriptions.

#### Information within the Department's Possession/Knowledge

- Water Rights Database
- Water right file no. 39E 30119887 for previous permit on the same source.
- DNRC Technical Report dated May 14, 2021
- Letter from Montana Sage Grouse Habitat Conservation Program to Rusty Shaw of Denbury Inc. dated September 26, 2018.
- USGS Thornthwaite Water Balance Model
- Environmental Assessment by BLM Miles City Field Office dated August 2018 – link in file
- Weather station information from Ekalaka, Montana station.

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA). **NOTE:** Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; AU means animal units; and POD means point of diversion.

### **PROPOSED APPROPRIATION**

## FINDINGS OF FACT

1. The Applicant proposes to divert water from an unnamed tributary (UT) to Boxelder Creek, by means of an existing dam, from January 1 to December 31 up to 6.14 AF, from a point in Govt Lot 6 (S2NW), Section 4, T1S, R60E for industrial use from June 15 to December 31. The period of diversion listed here is different than what was shown in the Technical Report because it was standardized to year-round by the Department. The place of use is generally located along the proposed pipeline right-of-way and access roads. The place of use is:

- |                      |            |               |
|----------------------|------------|---------------|
| 1. SESE Section 34,  | T1S, R59E, | Carter County |
| 2. SWSW Section 35,  | T1S, R59E, | Carter County |
| 3. N2SW Section 35,  | T1S, R59E, | Carter County |
| 4. E2NW Section 35,  | T1S, R59E, | Carter County |
| 5. NWNE Section 35,  | T1S, R59E, | Carter County |
| 6. S2SE Section 26,  | T1S, R59E, | Carter County |
| 7. NESE Section 26,  | T1S, R59E, | Carter County |
| 8. NWSW Section 25,  | T1S, R59E, | Carter County |
| 9. SENW Section 25,  | T1S, R59E, | Carter County |
| 10. SWNE Section 25, | T1S, R59E, | Carter County |
| 11. N2NE Section 25, | T1S, R59E, | Carter County |
| 12. E2E2 Section 13, | T1S, R59E, | Carter County |
| 13. E2E2 Section 12, | T1S, R59E, | Carter County |
| 14. S2S2 Section 19, | T1S, R60E, | Carter County |
| 15. NESW Section 19, | T1S R60E,  | Carter County |
| 16. NWSE Section 19, | T1S R60E,  | Carter County |
| 17. E2NW Section 19, | T1S R60E,  | Carter County |
| 18. W2NE Section 19, | T1S R60E,  | Carter County |
| 19. S2SW Section 20, | T1S R60E,  | Carter County |
| 20. SWSE Section 18, | T1S R60E,  | Carter County |
| 21. N2SE Section 18, | T1S R60E,  | Carter County |
| 22. E2NE Section 18, | T1S R60E,  | Carter County |

23. W2W2 Section 18,	T1S R60E,	Carter County
24. W2W2 Section 7,	T1S R60E,	Carter County
25. N2N2 Section 7,	T1S R60E,	Carter County
26. E2SE Section 7,	T1S R60E,	Carter County
27. N2N2 Section 8,	T1S R60E,	Carter County
28. W2NW Section 8,	T1S R60E,	Carter County
29. S2S2 Section 6,	T1S R60E,	Carter County
30. S2S2 Section 5,	T1S R60E,	Carter County
31. NESE Section 5,	T1S R60E,	Carter County
32. W2SW Section 4,	T1S R60E,	Carter County
33. S2NW Section 4,	T1S, R60E,	Carter County
34. GL2 Section 4,	T1S, R60E,	Carter County
35. SWNE Section 4,	T1S, R60E,	Carter County
36. GL6 Section 4,	T1S, R60E,	Carter County
37. GL7 Section 4,	T1S, R60E,	Carter County
38. E2SE Section 31,	T1N, R60E,	Carter County
39. NWSW Section 32,	T1N, R60E,	Carter County
40. W2NW Section 32,	T1N, R60E,	Carter County
41. W2W2 Section 29,	T1N, R60E,	Carter County
42. W2 Section 20,	T1N, R60E,	Carter County
43. NENW Section 20,	T1N, R60E,	Carter County
44. E2W2 Section 17,	T1N, R60E,	Carter County
45. NE Section 17,	T1N, R60E,	Carter County
46. E2 Section 8,	T1N, R60E,	Carter County
47. SESW Section 8,	T1N, R60E,	Carter County
48. W2W2 Section 9,	T1N, R60E,	Carter County

2. Water will be pumped from an existing on-stream reservoir into trucks at the point of diversion and put into storage tanks for future use or spread along the pipeline right-of-way or access roads for dust suppression. Water for dust suppression is considered 100% consumptive.
3. The proposed appropriation is temporary ending on December 31, 2024.

# NA 39E 30150495 - Denbury Green Pipeline-Montana, LLC



## **§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA**

### **GENERAL CONCLUSIONS OF LAW**

4. The Montana Constitution expressly recognizes in relevant part that:
- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
  - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
  - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

5. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

- (a) (i) there is water physically available at the proposed point of diversion in the

amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural



resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

6. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

7. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

*Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

8. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

9. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

### **Physical Availability**

### **FINDINGS OF FACT**

10. The Applicant submitted a no flow measurement from August 2018 and requested a variance from flow measurement requirements in ARM 36.12.1702. The Applicant was granted a variance from flow measurements because of the non-perennial character of the source. The

USGS Thornthwaite Water Balance Model (MWBm) was used to estimate the annual volume of water in the UT. The Thornthwaite model is an accepted model for determining annual runoff from ephemeral streams in eastern Montana. There are several large reservoirs on the source including the proposed point of diversion and water is stored whenever it flows.

11. Mean monthly temperature and precipitation were obtained from the Ekalaka, Montana weather station. The latitude was set to 46 degrees north and the elevation to 1045 meters above mean sea level. The Thornthwaite model takes the weather data, latitude and elevation and returns total runoff in millimeters per month. The runoff is converted to feet and multiplied by the number of acres in the contributing drainage basin to get monthly runoff in AF. The basin of the UT to Boxelder Creek has a drainage basin of 9.0 square miles based on mapping in the USGS StreamStats program. Annual runoff from the UT is estimated at 780.5 AF/YR.

**Table 1. Thornthwaite water balance model physical availability at proposed POD**

Ekalaka, MT Weather Data Lat 46 degrees, elevation 3430 feet (1045m) AMSL									
Month	Mean Temp (F)	Temp (Degree C)	Mean Precip. (in)	Precip. (mm)	ROTotal			AF/Month	
					mm	inches	feet		
January	18.5	-7.50	0.46	11.68	12.7	0.5000	0.0417	240.00	
February	22.2	-5.44	0.4	10.16	6.3	0.2480	0.0207	119.06	
March	30.9	-0.61	0.6	15.24	3.2	0.1260	0.0105	60.47	
April	43.6	6.44	1.31	33.27	3.3	0.1299	0.0108	62.36	
May	53.9	12.17	2.36	59.94	3.8	0.1496	0.0125	71.81	
June	63.1	17.28	3.15	80.01	4.4	0.1732	0.0144	83.15	
July	71.1	21.72	1.87	47.50	2.6	0.1024	0.0085	49.13	
August	69.4	20.78	1.36	34.54	1.8	0.0709	0.0059	34.02	
September	58.5	14.72	1.35	34.29	1.8	0.0709	0.0059	34.02	
October	46.3	7.94	1.01	25.65	1.3	0.0512	0.0043	24.57	
November	31.8	-0.11	0.52	13.21	0.1	0.0039	0.0003	1.89	
December	22.4	-5.33	0.41	10.41	0	0.0000	0.0000	0.00	
TOTAL					41.30	1.63	0.14	780.47	TOTAL (AF/YR)

12. Based on the volumes produced by the Thornthwaite Water Balance Model, the monthly volume and flow rate of water available in the drainage basin of the UT is shown in the table below. Flow rate was calculated as volume divided by 1.98 times number of days in the month.

**Table 2. Monthly flow rate and volume in the UT Boxelder Creek based on the Thornthwaite MWBM**

	January	February	March	April	May	June	July	August	September	October	November	December
<b>Volume (AF) at POD</b>	240.00	119.06	60.47	62.36	71.81	83.15	49.13	34.02	34.02	24.57	1.89	0.00
<b>Flow Rate at POD (CFS)</b>	3.91	2.15	0.99	1.05	1.17	1.40	0.80	0.55	0.57	0.40	0.03	0.00

13. The UT is a non-perennial source and flows during low elevation snow melt and precipitation events. It cannot be expected to follow a consistent monthly hydrograph and the MWBM does not provide an accurate depiction of flow rate or volume by month. Moreover, the source is heavily regulated with multiple reservoirs that impound water when it is available. Because of the reservoirs, water availability in the UT is not dependent on the timing of water production in the basin. In order to accurately assess the physical availability of water, the Department will consider the annual volume of water in the basin as determined by the MWBM. This is appropriate because the timing of water production in the basin by month does not control the physical availability of water by month. The physically available volume of water in the drainage basin of the UT is 780.47 AF/YR.

14. The proposed point of diversion is the most downstream dam on the source. Because the MWBM estimates the total runoff for the drainage basin of the UT, all existing water rights above the proposed point of diversion including existing water rights on the reservoir were subtracted from the estimated amount of water physically available in the drainage basin of the UT to determine the physically available water volume remaining at the proposed POD. Legal demands are listed in the table below.

**Table 3. Existing rights on UT Boxelder Creek**

WR NUMBER	OWNERS	PURPOSES	MEANS OF DIVERSION	TRS	ACRE S	VOLUM E	PERIOD	AU
39E 129497 00	BRENDA L FAZEKAS	STOCK	LIVESTOCK DIRECT FROM SOURCE	1N59E30	0.00	4.51	01/01 to 12/31	265.0
39E 129498 00	BRENDA L FAZEKAS	STOCK	LIVESTOCK DIRECT FROM SOURCE	1N59E30	0.00	4.51	01/01 to 12/31	265.0

39E 129499 00	BRENDA L FAZEKAS	STOCK	LIVESTOCK DIRECT FROM SOURCE	1N59E30	0.00	4.51	01/01 to 12/31	265.0
39E 1329 00	JOE T BREDDING	STOCK	UNKNOWN	1N59E28	0.00	2.08	01/01 to 12/31	122.5
39E 1330 00	JOE T BREDDING	STOCK	UNKNOWN	1N59E33	0.00	2.08	01/01 to 12/31	122.5
39E 171945 00	MCCABE ENTERPRISES LLC	STOCK	DAM	1N59E27	0.00	3.40	01/01 to 12/31	200.0
39E 174175 00	TRAVIS J WALKER	IRRIGATION	PUMP/HEADGATE W/DITCH OR PIPELINE/FLOOD AND DIKE	1S60E4	100.00	150.00	02/15 to 11/19	0.0
39E 174176 00	TRAVIS J WALKER	IRRIGATION	DAM	1S60E5	120.00	252.00	02/15 to 11/19	0.0
39E 176634 00	TRAVIS J WALKER	STOCK	LIVESTOCK DIRECT FROM SOURCE	1S60E5	0.00	2.64	01/01 to 12/31	155.5
39E 176635 00	TRAVIS J WALKER	STOCK	LIVESTOCK DIRECT FROM SOURCE	1S60E4	0.00	2.64	02/15 to 11/19	155.5
39E 176637 00	TRAVIS J WALKER	STOCK	LIVESTOCK DIRECT FROM SOURCE	1S60E5	0.00	2.64	01/01 to 12/31	155.5
39E 201461 00	MCCABE ENTERPRISES LLC	STOCK	LIVESTOCK DIRECT FROM SOURCE	1N59E35	0.00	4.25	01/01 to 12/31	250.0
39E 30115390	JOE T BREDDING	STOCK	LIVESTOCK DIRECT FROM SOURCE	1S60E6	0.00	2.14	01/01 to 12/31	126.0
39E 59728 00	USA (DEPT OF AGRICULTURE FOREST SERVICE)	STOCK	DAM	1N59E28	0.00	1.22	01/01 to 12/31	72.0
			<b>Total Appropriated Volume (AF)</b>			<b>438.63</b>		

15. When the legal demands in the drainage basin of the UT are subtracted from the estimated annual volume of water in the drainage basin, the physically available volume of water at the proposed POD is 341.84 AF/YR ( $780.47 - 438.63 = 341.84$  AF/YR).

## CONCLUSIONS OF LAW

16. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

17. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

18. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 10 - 15)

**Legal Availability:**

**FINDINGS OF FACT**

19. The area of potential impact for this application is the entire reach of the UT to the historical confluence with Boxelder Creek. Variables considered in the determination of this area of potential impact include the ephemeral nature of the UT, the recognition that it is often dry and not a viable contributor to Boxelder Creek, and connectivity issues. Aerial photographs going back ten years indicate that the UT is no longer connected to Boxelder Creek. Irrigated land extends across the historical stream channel and the only potential input to Boxelder Creek is return flows from that irrigation and potentially seepage from upstream reservoirs. The UT is non-perennial, not connected, and unlikely to be a viable contributor to Boxelder Creek.

Therefore, the area of potential impact does not include Boxelder Creek.

20. There are no legal demands between the proposed POD and the historical confluence of the UT and Boxelder Creek.

21. A comparison of the volume of water physically available at the proposed POD and the legal demands in the area of potential impact shows that there is water legally available in the UT at the proposed POD in the amount requested by the Applicant (ARM 36.12.1705).

**CONCLUSIONS OF LAW**

22. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

23. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

24. A flow of water on a given date does not show that water is legally available without showing that all prior appropriators were diverting all claimed water at that moment. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 5-6. A flow of water past a point on a particular date or dates does not demonstrate that water is legally available. Id.

25. In analyzing legal availability for surface water, applicant was required to evaluate legal demands on the source of supply throughout the “area of potential impact” by the proposed use under §85-2-311(1)(a)(ii), MCA, not just within the “zone of influence.” Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.

26. *In the Matter of Beneficial Water Use Permit No. 62935-s76LJ by Crop Hail Management* (DNRC Final Order 1991)(Applicant showed water physically available for appropriation by producing evidence based on upstream diversions; however, he failed to show water legally available with information of downstream uses).

27. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 19 - 21)

### **Adverse Effect**

### **FINDINGS OF FACT**

28. The dam is existing and owned by another appropriator and therefore cannot be altered by this applicant if a call is made. The Applicant is using pumps which can be shut down any time call is made. Shutting down the pumps would completely eliminate the diversion associated with this appropriation. The Applicant proposes to monitor all water withdrawals and uses during the project activities to ensure compliance with permits, additionally, the Applicant has land access agreements in place with landowners in the project area that allow the landowners to stop Denbury from withdrawing water if low water levels start to impact existing uses. These agreements ensure existing water rights will be protected. If call is made or landowners request a halt to withdrawal of water at this point of diversion, the Applicant will seek other sources of supply including purchasing water.

29. The volume of water physically available in the drainage basin of the UT exceeds all legal demands within the basin.

### **CONCLUSIONS OF LAW**

30. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing



water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

31. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(5).

32. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

33. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

34. It is the applicant’s burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

35. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

36. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 28-29)

### **Adequate Diversion**

### **FINDINGS OF FACT**

37. The dam is in place and has been since 1943. No changes to the dam are proposed. The reservoir does not have an estimated capacity in the water right record. Based on GIS mapping using aerial imagery and a USGS topographic map, the surface area of the reservoir is 5.58 acres. The max depth of 9.78 ft was estimated using the Lampkin Gulch 7.5-minute topographic map with 20 ft. contour intervals. The estimated capacity of the reservoir is 21.84 AF ( $5.58 * 9.78 * 0.4 = 21.84$ ). Water right 39E 174175-00 claims 150 AF diverted volume from this reservoir (6.87 times the capacity). The original filing, dated February 27, 1943, indicates that the diversion is an overflow dam to a ditch. There is no active removal of water from the reservoir. Manning's equation applied to the dimensions of the ditch given in the filing indicates the ditch capacity is over 60 CFS. When water is present in the drainage basin of the UT, it fills the reservoir and overflows at up to 60 CFS into the ditch as a water spreading system. There is no measuring device on the overflow and water is diverted when available. The diversion of water for Statement of Claim 39E 174175-00 is not dependent on the capacity of the reservoir. For example, at 60 CFS, the claimed volume of 150 AF would be delivered in less than 2 days. The Thornthwaite estimate of water availability in the basin indicates that the 150 AF volume would be available annually.

38. All available aerial photographs show water in the reservoir.

39. A Secondary diversion from the reservoir will be used to achieve the beneficial use. Water for dust abatement will be diverted from the existing reservoir by contracted water tank trucks. Typically, water trucks divert at a flow rate up to 250 GPM. All water diversions will be measured, and contractors will be required to maintain water gauges on each pump. Water use logs will be maintained to document specific water quantities withdrawn at the PODs.

### **CONCLUSIONS OF LAW**

40. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

41. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

42. Whether party presently has easement not relevant to determination of adequate means of diversion. *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989).

43. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 37-39).

### **Beneficial Use**

### **FINDINGS OF FACT**

44. The Applicant proposes to use water for industrial use, specifically dust abatement. Industrial use is a recognized beneficial use under the Montana Water Use Act.

45. No flow rate is requested because the dam is onstream, existing and impounding all water that flows into it. The flow rate from the reservoir by the tank trucks is 250 GPM which is within the typical range for the water tank trucks that will be used for this purpose.

46. The requested volume of 6.14 AF for dust abatement is based on the length and width of the construction right of way and access roads. The Applicant has requested overlapping water rights from multiple sources in order to ensure water availability in case some proposed sources become unavailable because of existing legal demands, sage grouse habitat timing and the ephemeral nature of water supplies in eastern Montana.

### **CONCLUSIONS OF LAW**

47. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

48. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds, Dee Deaterly v. DNRC et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

49. Applicant proposes to use water for industrial use which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence industrial use is a beneficial use and that 6.14 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 44-46)

### **Possessory Interest**

### **FINDINGS OF FACT**

50. The Applicant signed the affidavit on the application affirming the applicant has the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. This appropriation is specifically for dust abatement along the pipeline right-of-way and access roads. No water can be used in the absence of right-of-way agreements which constitute written consent.

## CONCLUSIONS OF LAW

51. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

52. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

53. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 50)

## PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 39E 30150495 should be GRANTED. The permit is temporary and will expire on December 31, 2024.

The Department determines the applicant may divert water from the UT of Boxelder Creek, by means of a dam, from January 1 to December 31 up to 6.14 AF, from a point in Govt. Lot 6 (S2NW), Section 4, T1S, R60E, Carter County, for industrial use from June 15 to December 31.

The place of use is the proposed pipeline right-of-way and access roads located in:

- |                      |            |               |
|----------------------|------------|---------------|
| 1. SESE Section 34,  | T1S, R59E, | Carter County |
| 2. SWSW Section 35,  | T1S, R59E, | Carter County |
| 3. N2SW Section 35,  | T1S, R59E, | Carter County |
| 4. E2NW Section 35,  | T1S, R59E, | Carter County |
| 5. NWNE Section 35,  | T1S, R59E, | Carter County |
| 6. S2SE Section 26,  | T1S, R59E, | Carter County |
| 7. NESE Section 26,  | T1S, R59E, | Carter County |
| 8. N2SW Section 25,  | T1S, R59E, | Carter County |
| 9. SENW Section 25,  | T1S, R59E, | Carter County |
| 10. SWNE Section 25, | T1S, R59E, | Carter County |
| 11. N2NE Section 25, | T1S, R59E, | Carter County |
| 12. E2E2 Section 13, | T1S, R59E, | Carter County |
| 13. E2E2 Section 12, | T1S, R59E, | Carter County |
| 14. S2S2 Section 19, | T1S, R60E, | Carter County |
| 15. NESW Section 19, | T1S R60E,  | Carter County |
| 16. NWSE Section 19, | T1S R60E,  | Carter County |
| 17. E2NW Section 19, | T1S R60E,  | Carter County |
| 18. W2NE Section 19, | T1S R60E,  | Carter County |
| 19. S2SW Section 20, | T1S R60E,  | Carter County |
| 20. SWSE Section 18, | T1S R60E,  | Carter County |
| 21. N2SE Section 18, | T1S R60E,  | Carter County |
| 22. E2NE Section 18, | T1S R60E,  | Carter County |
| 23. W2W2 Section 18, | T1S R60E,  | Carter County |
| 24. W2W2 Section 7,  | T1S R60E,  | Carter County |

25. N2N2 Section 7,	T1S R60E,	Carter County
26. E2SE Section 7,	T1S R60E,	Carter County
27. N2N2 Section 8,	T1S R60E,	Carter County
28. W2NW Section 8,	T1S R60E,	Carter County
29. S2S2 Section 6,	T1S R60E,	Carter County
30. S2S2 Section 5,	T1S R60E,	Carter County
31. NESE Section 5,	T1S R60E,	Carter County
32. W2SW Section 4,	T1S R60E,	Carter County
33. S2NW Section 4,	T1S, R60E,	Carter County
34. GL2 Section 4,	T1S, R60E,	Carter County
35. SWNE Section 4,	T1S, R60E,	Carter County
36. GL6 Section 4,	T1S, R60E,	Carter County
37. GL7 Section 4,	T1S, R60E,	Carter County
38. E2SE Section 31,	T1N, R60E,	Carter County
39. NWSW Section 32,	T1N, R60E,	Carter County
40. W2NW Section 32,	T1N, R60E,	Carter County
41. W2W2 Section 29,	T1N, R60E,	Carter County
42. W2 Section 20,	T1N, R60E,	Carter County
43. NENW Section 20,	T1N, R60E,	Carter County
44. E2W2 Section 17,	T1N, R60E,	Carter County
45. NE Section 17,	T1N, R60E,	Carter County
46. E2 Section 8,	T1N, R60E,	Carter County
47. SESW Section 8,	T1N, R60E,	Carter County
48. W2W2 Section 9,	T1N, R60E,	Carter County

### **NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 26<sup>th</sup> day of August 2021.

/Original signed by Mark Elison/

Mark Elison, Manager

Billings Office

Department of Natural Resources and Conservation



**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 26<sup>th</sup> day of August 2021, by first class United States mail.

DENBURY GREEN PIPELINE-MONTANA

%RUSTY SHAW

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CHRISTINE SCHWEIGERT

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DATE